85-1247

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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CASE NO._____

SUPREME COURT OF THE UNITED STATES

October Term 1985

BOHDAN CHMELICKY,

Petitioner,

vs.

PHYLLIS MUCHEWICZ,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE EIGHTH DISTRICT COURT OF APPEALS

STATE OF OHIO

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QUESTIONS PRESENTED

1. Whether Ohio's Appellate Rule 9 (C), as applied in this case, is unconstitutional as violative of the Seventh Amendment to the United States Constitution by permitting a trial court judge to overrule and contradict an appellate record unanimously approved by the jury.

2. Whether a trial court judge can enter a judgment notwithstanding the unanimous verdict of the jury when the jury's verdict was a special verdict rather than a general verdict.

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OPINIONS BELOW

The opinion of the Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County, unreported, appears in the Appendix hereto. No opinion was rendered by the trial court or the Supreme Court of Ohio.

JURISDICTION

The Supreme Court of Ohio, by entry dated August 28, 1985, sua sponte dismissed petitioner's motion to certify to that court, thereby affirming the Court of Appeals of Ohio, Eighth Appellate District's, affirmance of the trial court's judgment notwithstanding the unanimous special verdict of the jury. This petition for Certiorari was filed, although improperly, within ninety (90) days of that date in accordance with 28 U.S.C. section 2101 (C). This Petition for Certiorari was promptly, properly

re-submitted in accordance with Supreme Court Rule 33.7. This Court's jurisdiction is invoked under 28 U.S.C. section 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, VII Amendment:

In suits at Common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

United States Code, Title 28, section 1257 (3):

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows...(3) By Writ of Certiorari, where the validity of a treaty or statute of the United States

is drawn in question or where the validity of a State statute is drawn in question of its being repugnant to the Constitution, treaties or laws of the United States, or where any title right, or privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

United States Code, Title 28, section 2101 (C):

Any other appeal or any Writ of Certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a Writ of Certiorari for a period not exceeding sixty days.

Ohio Appellate Rule 9 (C):

If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee no later than twenty days prior to the time for transmission of the record pursuant to Rule 10, who may serve objections or propose amendments thereto within ten days after service. Thereupon, the statement and any objections or proposed amendments shall be forthwith submitted to the trial court for settlement and approval. The trial court shall act thereon prior to the time for transmission of the record pursuant to Rule 10, and, as settled and approved, the statement shall be included by the

clerk of the trial court in the record on appeal.

STATEMENT OF THE CASE

On August 5, 1983 the petitioner filed a Complaint against respondent alleging respondent had violated Ohio's Landlord-Tenant Act and stated other causes of action. The respondent entered a general denial and counterclaimed that petitioner owed her money for improving her property.

A jury trial was held before the Honorable Clarence L. Gaines, Judge of the Housing Division of the Cleveland Municipal Court, on May 17, 18, 21, and 22, 1984. On May 22, 1984 the jury returned a unanimous verdict for petitioner in the amount of $2,810.63. The jurors' Answers to Special Interrogatories were consistent with the general verdict. The respondent moved for a judgment notwithstanding the verdict.

On June 25, 1984 the trial court granted respondent's Motion For Judgment Notwithstanding the Verdict. Petitioner, pursuant to Ohio Appellate Rule 4, timely filed his Notice of Appeal from the order of June 25, 1984 on July 2, 1984.

On July 10, 1984 petitioner filed with the trial court an Ohio Appellate Rule 9(C) Statement of Evidence, the trial proceedings not having been recorded, which had been read by and unanimously approved by the jury which heard the case. On July 25, 1984 respondent filed her Ohio Appellate Rule 9(C) Objections to petitioner's Statement of Evidence and deleted testimony from petitioner's Statement of Evidence. Nonetheless, the trial court approved respondent's objections to petitioner's Statement of Evidence by order dated August 9, 1984.

On August 16, 1984, pursuant to Ohio Appellate Rule 4, petitioner timely filed his Notice of Appeal from the order of August 9, 1984. Petitioner's Motion to Consolidate the Appeals, numbers 48949 and 49090, was granted.

On appeal to the Court of Appeals of Ohio, Eighth Appellate District, the petitioner challenged that Ohio's Appellate Rule 9(C) had been applied unconstitutionally, violating his Seventh Amendment Constitutional right to a trial by jury, and that the trial court erred in granting a judgment notwithstanding the unanimous and special verdict of the jury, also in violation of his Seventh Amendment Constitutional right to a trial by jury. By order dated April 15, 1985 the Court of Appeals for Cuyahoga County, Ohio, Eighth District, held that Ohio's Appellate Rule 9(C) did not violate

the Seventh Amendment to the United States Constitution, that a trial court judge could overrule and contradict a record unanimously approved by the jury which heard the case, and held that a trial court judge could enter a judgment notwithstanding the verdict even if the jury's verdict was a special verdict.

Petitioner timely filed his Notice of Appeal to the Supreme Court of Ohio in the Cuyahoga County Court of Appeals on May 13, 1985. Petitioner timely filed his Memorandum in Support of Jurisdiction in the Supreme Court of Ohio on June 12, 1985. The Supreme Court of Ohio on August 28, 1985 sua sponte dismissed petitioner's appeal. Petitioner has now timely petitioned this Honorable Court for A Writ of Certiorari.

A R G U M E N T

1. OHIO'S APPELLATE RULE 9(C), AS APPLIED IN THIS CASE, IS UNCONSTITUTIONAL AS VIOLATIVE OF THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY PERMITTING A TRIAL COURT JUDGE TO OVERRULE AND CONTRADICT AN APPELLATE RECORD UNANIMOUSLY APPROVED BY THE JURY.

In the case at bar Ohio's Appellate Rule 9(C) permitted the trial court judge to approve objections to a Statement of Evidence which had been unanimously approved by the jury which contradicted that Statement of Evidence and deleted testimony therefrom. This impermissibly allows the trial court to be the ultimate finder of facts, not the jury. Petitioner urges this Honorable Court to find Ohio's Appellate Rule 9(C), as applied in this case, to be unconstitutional.

The Seventh Amendment to the United

States Constitution provides as follows:

> In suits at Common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

This constitutional provision has been interpreted to require that issues of fact are to be determined by the jury. Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935). The Seventh Amendment not only preserves the right to a trial by jury but also discloses a studied purpose to protect it from indirect impairment through possible enlargements of the power of re-examination existing under the common law, and to that end declares that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of

the common law."

Baltimore & Carolina Line, Inc. v. Redman, id. at 657.

Here, the determination of the record on appeal, the Statement of Evidence, was an issue of facts, not of law, and the trial court erred in approving respondent's objections which contradicted and deleted evidence from a Statement of Evidence which was unanimously approved by the jury. For, at the common law the trial court judge did not have the power to contradict a record unanimously approved by the jury. In the case at bar facts tried, and specially found, by a jury have been re-examined otherwise than according to the rules of the common law in violation of the Seventh Amendment to the United States Constitution. This most Honorable Court should grant petitioner's request for a Writ of

Certiorari because maintenance of the jury as a fact-finding body is of such importance, and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. Dimich v. Schiedt, 293 U.S. 474, 486 (1935).

2. A TRIAL COURT JUDGE CAN NOT ENTER A JUDGMENT NOTWITHSTANDING THE UNANIMOUS VERDICT OF THE JURY WHERE THE JURY'S VERDICT IS A SPECIAL VERDICT RATHER THAN A GENERAL VERDICT.

In the case at bar the jury returned a unanimous verdict for the petitioner for $2,810.63. The jury also answered special interrogatories making specific findings of fact in petitioner's favor on all factual issues and consistent with the jury's general verdict. As

such, the jury's verdict constituted what is known as a special, rather than a general verdict. A trial court is powerless to enter a judgment notwithstanding the verdict of the jury where that verdict is a special, rather than a general verdict, and is duty bound to enter that judgment dictated by the specific facts found by the jury. Walker v. New Mexico and Southern Pacific Railroad Company, 165 U.S. 593, 596-598; U.S. Constitution, Amendment VII.

In the case at bar the trial court clearly violated the rule announced in Walker, id. at 596-598, and petitioner's Seventh Amendment constitutional right to a trial by jury by entering a judgment notwithstanding a special jury verdict. The trial court further compounded its injustice by "snowing" the Ohio Court of Appeals, Eighth District, with a diluted

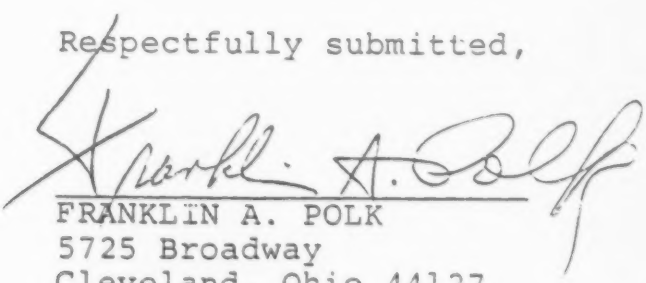
and inaccurate record on appeal.

This most Honorable Court should grant petitioner's request for a Writ of Certiorari because maintenance of the jury as a fact-finding body is of such importance, and occupies so firm a place in our history and jurisprudence, that any seeming curtailment of the right to a jury trial should be scrutinized with utmost care. Dimick v. Schiedt, 293 U.S. 474, 486(1935).

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment of the Eighth District Court of Appeals, State of Ohio, or, in accordance with Supreme Court Rule 23, an order should issue returning the jury's special verdict to petitioner summarily.

Respectfully submitted,



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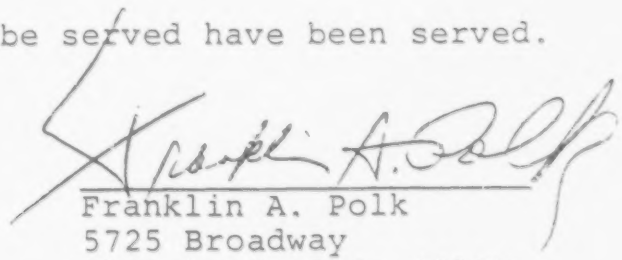
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of January, 1986 three copies of the Petition for Writ of Certiorari in this matter were mailed postage prepaid to the attorney for Respondent, Robert Troll Lynch, Esq., 711 Statler Office Tower, Cleveland, Ohio 44115. I also certify that all parties required to be served have been served.



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The jury returned verdicts in favor of the plaintiff-tenant on his three claims against the defendant-landlord and in the tenant's favor on the landlord's counterclaim. Thereafter, the court granted a motion by the landlord for a judgment notwithstanding that verdict. The court's judgment denied the tenant any relief and granted the landlord unspecified relief on her counterclaim against the tenant. The tenant appeals, claiming that the court erred (a) by approving the landlord's objections to the tenant's proposed statement of the evidence pursuant to App. R. 9(C), and (b) by granting the landlord's motion for a judgment notwithstanding the contrary verdict. The tenant also contends that App. R. 9(C) is unconstitutional as applied in this case.

The tenant's contentions regarding the App. R. 9(C) record lack merit. However, the court should not have rejected the jury's verdicts (1) that the landlord converted the tenant's personal property, and (2) that the landlord failed to prove her counterclaim. The judgment was proper on the remaining claims. Hence, we modify the court's judgment was proper on the remaining claims.

The tenant's complaint claims that the landlord: (a) wrongfully ejected him from the leased premises, (b) failed to reimburse him for various improvements he made to the landlord's property, and (c) wrongfully seized some of his furnishings. The landlord denied the material allegations of the tenant's complaint and counterclaimed for damages from the tenant's allegedly unauthorized repair of the leased premises.

We have no transcript of the evidence at the jury trial. The tenant seemingly relies on his proposed but contested App. R. 9(C) record. Apparently, the trial court settled the record when it modified the tenant's proposed statement of the proceedings, by sustaining the landlord's objections and additions to that statement. The court's edited App. R. 9(C) statement is set forth as an appendix to this opinion.

I.

The tenant's first three assigned errors dispute the trial court's compliance with App. R. 9(C):

> "1. The trial court erred when it approved Defendant-Appellee's Appellate Rule 9(c) objections to Plaintiff's Statement of Evidence insofar as they contradicted Plaintiff-Appellant's Statement of Evidence which was approved unanimously by the jury."

"2. The trial court grossly abused its discretion when it approved Defendant-Appellee's Appellate Rule 9(c) objections to Plaintiff's Statement of Evidence insofar as they contradicted Plaintiff-Appellant's Statement of Evidence which was unanimously approved by the jury."

"3. Appellate Rule 9(c), as applied in this case, is unconstitutional as violative of the Seventh Amendment to the United States Constitution and Article I, Section 5 of the Ohio Const."

The tenant's counsel submitted his proposed statement of the evidence to the jury and secured their written approval before he submitted it to the judge. He challenges the trial court's failure to accept his "jury-approved" statement of the evidence. Alternatively, he argues that the court's action constituted (a) legal error, (b) an abuse of the court's discretion, and (c) a denial of his constitutional right to trial by jury.

App. R. 9(C) provides:

"(C) Statement of the Evidence or Proceedings When No Report Was Made or When the Transcript is Unavailable. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee no later than twenty days prior to the time for transmission of the record pursuant to Rule 10, who may serve objections or propose amendments thereto within ten days after service. Thereupon, the statement and any objections or proposed amendments shall be forthwith submitted to the trial court for settlement and approval. The trial court shall act thereon prior to the time for transmission of the record pursuant to Rule 10, and, as settled and approved, the statement shall be included by the clerk of the trial court in the record on appeal."

In Jones v. Illuminating Co. (1978), 55 Ohio App. 2d 187, this court explained at pp. 195-96:

"In order to understand the trial court's authority under Appellate Rule 9 and to resolve the issues raised in this appeal, it is necessary to understand the meaning of th words 'settle,' 'approve,' and 'conform to the truth.' "

"Appellate Rules 9(C), (D), and (E) clearly state that if there are any objections, proposed amendments, or disagreements as to the proper contents of a statement of evidence or proceedings, of an agreed statement, or of the record as usually constituted under App. R. 9(A), these differences shall be submitted to and settled by the court. Naturally, settlement by the court would be required only when there are such objections, proposed amendments, or disagreements."

"The terms 'approval' and conforms to the truth' as employed by Appellate Rules 9(C), (D), and (E), mean that the trial court must first determine the accuracy and truthfulness of a proposed statement of the evidence or proceedings or an agreed statement and then approve it and sign it. This gives the trial judge the responsibility, duty, and authority to delete, add, or otherwise modify portions of a proposed statement so that it will conform to the truth and be accurate before he approves it." (Emphasis added.)

The tenant seeks to demonstrate errors and inadequacies in the court's approved statement by directing us to the jurors the court's approved statement by directing us to the jurors "approval" of his proposed statement. Essentially, he contends that

the "vote" was 8 to 1 in favor of his statement of the evidence. Under App. R. 9(C), only the trial judge has authority to "delete, add or otherwise modify" the tenant's proposed statement of the evidence. The fact that the jury "approved" a particular statement of the evidence does nothing to alter the court's sole responsibility and authority under this rule.

An appellate court cannot resolve disputes about the trial court's record in the course of an appeal. Associated Estates Corp. v. Fellows (1985), 11 Ohio App. 3d 112, 115; Schneider Transport Inc. v. Silberman & Co., Inc. (April 4, 1984), Cuyahoga App. No. 47292, unreported. The appellate court can authorize correction or supplementation of the trial court's record when the accuracy of proposed changes is undisputed. Id.; see

Belcher v. Belcher (Jan. 31, 1980), Cuyahoga App. No. 39662, unreported; cf. Graphic Laminating, Inc. v. Creative Enterprise, Inc. (Dec. 7, 1978), Cuyahoga App. No. 38030, unreported.

In this case, the tenant requests this court to determine whether the jury's "approved" statement or the court's approved statement more accurately reflects the trial evidence. That dispute involves factual issues about the trial proceedings which we cannot resolve on an appeal. Thus, the tenant has failed to demonstrate error or an abuse of discretion in the formulation of the record.

The tenant also argues that the court's failure to approve the statement signed by the jurors denied him his right to a trial by jury. He reasons

that App. R. 9(C) permits the judge to be the ultimate fact-finder in a jury trial that is the subject of an appeal. We disagree because a proper App. R. 9(C) statement does not resolve disputes in competing evidence.

App. R. 9(C) describes the procedure for providing an appellate court with a record of the evidence presented at the trial. Associated Estates Corp., supra. It should not duplicate or substitute for a trial court's findings of fact under Civ. R. 52. Fact-finding under Civ. R. 52 requires a resolution of disputes in the evidence, while App. R. 9(C) requires a neutral recital of the evidence presented. Thus, the trial court's responsibility under App. R. 9(C) does not denigrate the jury's fact finding, nor does it impair a party's right to a trial by jury.

A trial court's authority to "delete, amend, or modify" an App. R. 9(C) statement may conceivably produce a prejudicially partisan or incomplete statement of the evidence. As we explained earlier, those circumstances may justify mandamus to complete or correct the record. In addition, som purported App. R. 9(C) statements may indicate on their face that the trial judge resolved rather than recited disputes in the evidence. In that situation, an appellate court could sustain an assignment of error which contests the court's compliance with App. R. 9(C). In this case, the App. R. 9(C) statement is a recitation of evidence, even though it contains some factual findings. See Associated Estates Corp., supra.

The tenant's first, second, and third

assigned errors lack merit.

II

The tenant's fourth assigned error asserts:

> "The trial court erred when it granted defendant-appellee's motion for judgment notwithstanding the verdict."

Consonant with Civ. R. 50(E), the trial court found that the jury's verdict "was unsupported by any evidence." The tenant argues that the trial court should not have granted the landlord's motion for a judgment notwithstanding the verdict because it denied her motion for a directed verdict at the close of all the evidence.

The court may grant a party's motion for a judgment notwithstanding the verdict, "whether or not a motion to direct a verdict has been made or over-

ruled." Civ. R. 50(E). The court's denial of a party's directed verdict motion does not preclude its later approval of that party's motion for a judgment notwithstanding the verdict. Cf. Miller v. Benedict (1937), 25 Ohio L. Abs. 359.

The tenant next argues that the court should have ordered a remittitur or a new trial if it concluded that the jury's verdict was excessive. However, the court found that the verdict was "unsupported by sufficient evidence," not that it was excessive.

Finally, the tenant argues that he presented sufficient evidence to support the jury's verdict. A motion for a judgment notwithstanding the verdict does not involve the weight of the evidence. McComis v. Baker (1974), 40 Ohio App. 2d 332, 334-335. The trial court must

construe the evidence and inferences most strongly in favor of the non-moving party. The court should not sustain the motion unless reasonable minds can reach but on conclusion and that conclusion is adverse to the non-moving party. Id.

The tenant sought damages for wrongful eviction and restraint of his property under R.C. 5321.15(A) and (B):

> "(A) No landlord of residential premises shall initiate any act, including termination of utilities or services, exclusion from the premises, or threat of any unlawful act, against a tenant, or a tenant whose right to possession of residential premises has terminated, other than as provided in Chapters 1923., 5303., and 5321. of the Revised Code."
>
> "(B) No landlord of residential premises shall seize the furnishings or possessions of a tenant, or of a tenant whose right to possession has terminated, for the purpose of recovering rent payments, other than in accordance with an order issued by a court of competent jurisdiction."

He also claimed that the landlord made an oral promise to reimburse him for certain improvements in the apartment.

The statement of the proceedings contains evidence that: (a)the tenant rented an apartment from the landlord, (b)the tenant purchased a stove and refrigerator for that apartment, (c) the tenant had a new door installed in his apartment after a burglar damaged the old door, (d) the tenant's electric meter continued to run when all of his appliances were unplugged, (e)during winter months the tenant lived at another apartment, (f)the tenant had filed a lawsuit against the landlord's son, (g)the tenant moved because he was concerned for his own safety and the security of his possessions, (h)the landlord told the tenant to vacate the apartment, (i)the landlord claimed back

rent from the tenant, (j)the landlord still possessed the tenant's stove and refrigerator, (k) the landlord claimed that he bought the tenant's stove and refrigerator, and (l) the landlord's purported receipt from the tenant's alleged sale of the stove and refrigerator was a forgery.

This evidence fails to support a finding that the tenant was "wrongfully ejected from the leased premises." R.C. 5321.15(A). Likewise, the record here contains no evidence that the landlord agreed to reimburse the tenant for any improvements made by the tenant.

However, the tenant presented sufficient evidence from which the jury could find that the landlord "seized" the tenant's stove and refrigerator "for the purpose of recovering rental payments," in violation of R.C. 5321.15(B).

Reasonable minds could reach different conclusions on that evidence. Thus, the trial court erred by granting the landlord's motion for a judgment notwithstanding the verdict on the landlord's seizure of the tenant's property.

The jury answered special interrogatories that separately calculated damages for each of the tenant's claims. The jury specifically found that the landlord's seizure of the tenant's stove and refrigerator damaged the tenant in the amount of $606.63.

Similarly, the court should not have granted the landlord judgment on her counterclaims for damage from unauthorized repairs. There was sufficient evidence for the jury to find that the tenant had implied authority for repairs which enhanced the leased premises.

The tenant's fourth assigned error has merit with respect to his claim that the landlord seized his stove and refrigerator in violation of R.C. 5321.15(B). It also has merit with regard to the landlord's counterclaim. Thus, we modify the judgment to accept the jury's verdict for the tenant for $606.63, and to reject the landlord's counterclaim. Otherwise, we find that the tenant's fourth assigned error lacks merit. As modified, we affirm.

This cause is modified and affirmed.

It is, therefore, considered that said appellant(s) recover of said appellee(s) his costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Exceptions.

CORRIGAN, C.J. and

KRUPANSKY, J., CONCUR.

JUDGE
RICHARD M. MARKUS

APPENDIX

Trial Court's Edited App.R. 9(C) Record

On May 17, 1984 the Plaintiff called as his first witness the Defendant PHYLLIS MUCHEWIZ, as if on cross-examination. Ms. Muchewicz in response to further questioning denied all the allegations of Plaintiff.

On May 17, 1984 Plaintiff called as second witness a JOHN KUBASTA, [and] asked that Mr. Kubasta be declared a hostile witness and be examined as if on cross-examination. The Court conceded to Plaintiff's wishes for a time, but in the midst of questioning by Plaintiff's counsel, the trial Court changed its mind and ruled that Plaintiff's counsel could ask no more leading questions. Mr. Kubasta testified that the 3595 East 71st Street property, a double house, had only one

(1) water heater and one (1) furnace in the basement. Mr. Kubasta told the jury that the Plaintiff, BOHDAN CHMELICKY, was "stupid" and "couldn't even boil water for himself" and denied all the allegations of Plaintiff.

On May 17, 1984 Plaintiff called as his third witness a JIM QUEENER. Mr. Queener testified that the Plaintiff paid him $125.00 to install a new door at 3595 East 71st Street on or about April 22, 1982. Mr. Queener further testified that the old door was in pretty bad shape from being kicked in by burglars, and needed to be repaired or replaced.

On May 17, 1984 the Plaintiff called as his fourth witness himself. The Plaintiff testified that he was a foreigner who came to this country from Czechoslovakia around 1978, but that

he was presently a U.S. citizen. Plaintiff testified that the Defendant befriended him. Plaintiff testified that around June of 1981 the St. Alexis Hospital purchased the residential property he then resided in, that St. Alexis desired not to use the property for residential purposes, and gave him a thirty-day notice to vacate the premises. Plaintiff testified that when he told the Defendant he needed to find a new place to live, she said she had a place for him at 3595 East 71st Street. Plaintiff identified Plaintiff's "Exhibit #1" as a check to Defendant for $135.00, dated July 2, 1981, and testified that this check was paid to Defendant as the first month's rent, and that all further rent payments were paid to the Defendant. Plaintiff identified Plaintiff's "Exhibit

#2" as a check to John Kubasta, Jr. for $750.00, dated July 9, 1981. Plaintiff further testified that Defendant failed to reimburse him this $750.00. Plaintiff identified Plaintiff's "Exhibit #3" as a check to Steven's Furniture for $606.63, dated July 3, 1981, and testified that it was necessary for him to buy this refrigerator and stove as in July, 1981 there was no stove and refrigerator at 3595 East 71st Street, Plaintiff identified Plaintiff's "Exhibit #4" as a check to Southeast Carpet Service for $316.00, dated July 1, 1981, and testified that he bought this carpet. Plaintiff identified Plaintiff's "Exhibit #7" as a receipt from the Big D Home Center Company for $83.79, dated April 22, 1982, and testified that he paid Big D Home

Center Company $83.79 for a new door and parts necessary to install it. Plaintiff testified that in April of 1982 his apartment at 3595 East 71st Street was burglarized, the burglars gaining entrance by kicking in a door. He further testified [sic] that after the burglary the damaged door was unsafe in that it could be easily unlocked without a key. He testified that he told his landlord, the Defendant, about this situation. The Defendant told Plaintiff that she had no funds. Plaintiff testified that he paid $83.79 for a new door and parts to install it with, plus he paid a carpenter, JIM QUEENER, $125.00 to install same. Plaintiff further testified that the Defendant never reimbursed him for this necessary repair. Plaintiff testified that while he was living at 3595 East 71st Street,

he hired a private investigator, a Mr. JOHN CHRISTOPHER to investigate the situation. Plaintiff testified that when every electrical appliance in his apartment was shut off and unplugged that his electric meter still ran. Plaintiff testified that when the new carpet was installed at 3595 East 71st Street, that he was not there, that his landlord.[sic] Plaintiff testified that he lived at 3595 East 71st Street from July 1981 to June 24, 1983, excluding the winter months of 1981 and 1982 when he lived in a rooming house above the Finn Cafe. Nonetheless, Plaintiff testified from business records of the gas and electric companies, that his gas bill over this two year period of time was $2,088.59, and his electric bill over this two year period amounted

to approximately $400.00. Plaintiff testified that without seeking legal advice first he filed a small claims action against the Defendant's son, ALEX MUCHEWICZ, who lived in the apartment adjacent to Plaintiff's, as Plaintiff felt that Alex Muchewicz, the defendant's son, was receiving electric and gas that he was paying for. Plaintiff testified that this threat occurred on or about June 16, 1983.[sic] Plaintiff testified that he was concerned for his safety and the safety of his belongings and he therefore moved out of 3595 East 71st Street on or about June 24, 1983. He testified that the Defendant called the moving company, CORLETT MOVERS AND STORAGE COMPANY, to arrange the move. Plaintiff testified that he paid Corlett $104.00. The

trial court later refused to allow Plaintiff's "Exhibit #9" into evidence. Plaintiff testified that the Defendant and her son, Alex Muchewicz, supervised the June 24, 1983 move-out. Plaintiff testified that the Defendant claimed he owed her back rent. On cross-examination the Plaintiff referred to Defendant's "Exhibit B", and alleged receipt purportedly signed by Plaintiff, giving Defendant the subject stove and refrigerator. Plaintiff emphatically testified on cross-examination that this receipt was a forgery. At 4:30 P.M. on May 17, 1984 the Court recessed the trial during the midst of the cross-examination of Plaintiff. The Court instructed the jury, counsel, and the parties to return on May 18, 1984 at 10:30 A.M., and further informed everyone that the

Court would recess at 12:00 Noon on May 18, 1984 as he, the trial judge, had a judge's meeting to attend.

On May 18, 1984 at 10:30A.M. the trial resumed. Defense counsel completed his cross-examination of the Plaintiff. Then at approximately 11:30A.M. Plaintiff's counsel moved for a continuance as a witness was not available for some unknown reason. As the trial was to be recessed at noon anyway, the Court granted Plaintiff's motion and the trial was recessed until Monday, May 21, 1984.

On May 21, 1984, the Plaintiff called his fifth witness, JERRY BREN. Jerry Bren testified that he had known the Plaintiff for years, and was very familiar with the Plaintiff's signature. Upon being shown Defen-

dant's "Exhibit B" and being asked if that was the signature of Plaintiff, Jerry Bren testified "absolutely not", that the signature on Defendant's "Exhibit B" purported to be that of Plaintiff did not even closely resemble the signature of Plaintiff. Jerry Bren further testified that on or about June 26, 1984 he went to 3595 East 71st Street to visit the Plaintiff. That when he arrived there the Defendant's son, Alex Muchewicz, told him "Bohdan is not here, my mother threw him out". Jerry Bren, further testified "and there was Bohdan's stove, refrigerator and carpet still there."

On May 21, 1984 the Plaintiff called his final witness, a Mr. JOHN CHRISTOPHER. Mr. Christopher testified that he was

hired by the Plaintiff to investigate the Plaintiff's utility problems. Mr. Christopher identified Plaintiff's "Exhibit #10 as a business record he was the custodian of, that the record was such as are routinely kept as a part of the business and that he was under a duty to record the items contained in the record, and that such records were maintained accurately in accordance with a custom or routine.

The Plaintiff then moved all his Exhibits, 1-18, into evidence and rested. The Defendant moved for a directed verdict. The Motion was denied and Defendant called his first witness.

The Defendant called as a witness a BILL WICK, who testified he was employed by Southeast Carpet and he was the one who installed the new carpet

at 3595 East 71st Street. He testified that he remembered discussing the installation of the new carpet over the phone with Defendant, but that he remembered no details of the job and didn't remember who was there when he actually installed the carpet. He testified that if told to do so he would have covered up the heating vents, but that covering up heating vents was dangerous as it could damage the furnace.

Defendant called as a witness a handwriting analyst, a lady named ANNE JELSON. Ms. Jelson testified under oath that [sic]the signature on Defendant's "Exhibit B" was genuinely that of Plaintiff. On cross-examination Jelson admitted that she was being paid for her testimony.

Defendant called Jim Queener to testify. Jim Queener testified that

Defendant told him that "he could put the new door in, but that Plaintiff would pay for everything."

Defendant moved his[sic] exhibits into evidence, rested his[sic] case, and moved for a directed verdict. The Motion was denied. The Court then recessed until May 22, 1984.

On May 22, 1984 prior to giving closing arguments both counsel submitted requested jury instructions to the trial judge. Plaintiff's counsel also submitted special interrogatories to be given to the jury. The trial judge informed counsel that he would not instruct the jury as requested in paragraphs one and four of Plaintiff's proposed jury instructions. The trial judge also informed counsel that interrogatories eight (8) and nine (9)

of Plaintiff's Proposed written interrogatories to the jury would be blacked out and not given to the jury. The trial judge then ruled on the exhibits. He allowed Ms. Jelson's report into evidence over Plaintiff's objection that said report contained inadmissible hearsay within it.

Counsel gave their final arguments on May 22, 1984. The judge then instructed the jury. Prior to the jury retiring to deliberate counsel for Plaintiff, at sidebar, objected to the trial judge's not instructing the jury as requested in Plaintiff's proposed jury instructions, paragraphs one and four thereof.

On May 22, 1984 at 5:00P.M. the jury returned a verdict for the Plaintiff on Plaintiff's Complaint for $2,810.63.

The jury returned a verdict for Defendant on Defendant's Counterclaim for $0.00. The aforesaid jury verdicts were unanimous, all eight jurors agreeing. The jurors also unanimously answered Plaintiff's Interrogatories to the jury as follows:

1. Did the Defendant threaten the Plaintiff with any unlawful act for the purpose of recovering possession of 3595 East 71st Street?

ANSWER:

Yes.

2. If your answer to question number one is yes, what were the amount of damages caused to the Plaintiff as a result of Defendant's acts?

ANSWER:

$104.00.

3. Did the Defendant seize any

furnishings or possessions of the Plaintiff for the purpose of recovering rent payments other than in accordance with an order issued by a Court of competent jurisdiction?

ANSWER:

Yes.

4. If your answer to question number three is yes, what were the amount of damages caused to the Plaintiff as a result of Defendant's acts?

ANSWER:

$606.63.

5. Did the Plaintiff make expenditures to improve the property known as 3595 East 71st Street upon the Defendant's promise to reimburse Plaintiff for said expenditures?

ANSWER:

Yes.

6. If your answer to question number five is yes, did the Defendant fail to reimburse the Plaintiff as promised?

ANSWER:

Yes.

7. If your answer to question number six is yes, what is the amount of damages Plaintiff has suffered as a result of Defendant's failure to reimburse him?

ANSWER:

$900.00.

10. Did the oral rental agreement between Plaintiff and Defendant imply that Plaintiff would pay for the electric and gas used for the apartment he occupied only?

ANSWER:

Yes.

11. If your answer to question ten is yes, do you find that Defendant had

the wires and pipes hooked up so that Plaintiff's meters registered gas and electric used in Defendant's son's adjacent apartments?

ANSWER:

Yes.

12. If your answer to question number eleven is yes, what were the amount of damages Plaintiff suffered as a result of the way Defendant had the wires and pipes hooked up?

ANSWER:

$1,200.00.

[The preceding narrative excludes portions of the tenant's proposed statement of the evidence which the court effectively rejected by sustaining the landlord's objections. Additionally, the trial court approved the landlord's proposed additions to the tenant's App. R. 9(C) statement.]

1. The premises at 3595 East 71st Street were completely furnished by Defendant at the time Plaintiff moved in.

2. Plaintiff and Defendant agreed that Plaintiff would pay personally for all of the items he has claimed as to be reimbursed from Derendant.

3. Plaintiff[sic] hired investigator, Mr. John Christopher, admitted his investigation was incomplete and therefore not verifiable.

4. Plaintiff's witness, Jerry Bren, admitted his alcoholism and his conviction for negligent homicide. His Honor Judge Gaines, noted at sidebar out of the jury's hearing that alcohol was on Mr. Bren's breath during his testimony.

5. At no time did any witness for

Plaintiff prove that there was any theft of utilities by any person at any time, ciminally or civilly.

6. The small claims action by Plaintiff against Defendant's son for alleged theft of utilities was thrown out by small claims court, as testified to by witness John Kubasta.

7. No witness in the entire proceedings ever testified as to personal knowledge of Defendant, or anyone for that matter, hooking up wires and pipes in a manner that Plaintiff would be paying for utilities not actually used by him.

8. The court overruled jury[sic] and entered a Judgment N.O.V. subsequent to motion by Defendant, for Defendant on the Plaintiff's claim and for Defendant/Counterclaim-Plaintiff on Counterclaim.

CLEVELAND MUNICIPAL COURT

Bohdan Chmelicky	)	Gaines Jun21 1984
Plaintiff	)	No. 83CVG18776
vs	)	
Phyllis Muchewicz	)	JUDGMENT ENTRY
Defendant	)	

Motion for Judgment notwithstanding the verdict of the Jury. Granted.

The Court finds no basis for the verdict.

It was without reason or logic.

It made findings unsupported by any evidence

The Court finds for the Defendant on the Complaint and for the complaintant on the Counter-claim.

_____

_____

_____
JUDGE

CLEVELAND MUNICIPAL COURT

Bohdan Chmelicky	)	Judge C. Gaines
	)	8-9-84
Plaintiff	)	
	)	
vs.	)	No. 83CVG18776
	)	
Phyllis Muchewicz	)	JUDGMENT ENTRY
	)	
Defendant	)	
	)	

Defendant's Appellate Rule 9(C) Objections to Plaintiff's Statement of Evidence approved and is hereby accepted as Statement of Evidence in Appellate Rule 9(C).

_____

_____

_____
JUDGE

J#126,Pg.89

THE SUPREME COURT OF OHIO

Columbus

1985 Term

Bohdan Chemlicky,	)	To wit: 8-28-85
	)	
Appellant,	)	Case No. 85-892
	)	
v.	)	
	)	
Phyllis Muchewicz,	)	E N T R Y
	)	
Appellee.	)	

Upon consideration of the motion for an order directing the Court of Appeals for Cuyahoga County to certify its record and the claimed appeal as of right from same said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $20.00, paid by Franklin Polk.

FRANK D. CELEBREZZE
Chief Justice